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THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION AND THE OWNERSHIP OF SPORTS STATISTICS: THE UNTOLD STORY OF ROUND ONE

J. GORDON HYLTON*

In 2005, Major League Baseball Advanced Media (Advanced Media), the interactive media and Internet licensing arm of Major League Baseball (MLB), announced that it would begin collecting license fees from companies that provided baseball statistics (for a fee) to fantasy baseball players.¹ Shortly before this announcement, Advanced Media had entered into an agreement with the MLB Players Association (Players Association) under which the Players Association assigned the collective publicity rights of its members to Advanced Media “for exploitation via all interactive media.”² In response to a formal offer of a highly restrictive license from Advanced Media, C.B.C. Distribution and Marketing, Inc. (C.B.C.), a St. Louis-based provider of fantasy sports games and statistics, filed an action for a declaratory judgment against Advanced Media in federal district court in the Eastern District of Missouri.³

Although the complaint filed by C.B.C. raised federal copyright and trademark questions, the core question in the C.B.C. case was whether or not the publicity rights of MLB players allowed them to control the commercial use of statistics attached to their names. Because of this issue and because C.B.C. had previously entered into a licensing agreement with the Players Association, which had expired at the end of 2004, the Players Association was permitted to enter the litigation as an intervenor-counter claimant. In a

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1. See Darren Rovell, *Names, League Marks Will be Sublicensed*, ESPN.COM, Jan. 19, 2005, <http://sports.espn.go.com/espn/sportsbusiness/news/story?id=1970454>. Fantasy baseball is a multiple-player game in which results are determined by the on-the-field performance of MLB players as reflected in certain pre-selected statistical categories.

2. C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1081 (E.D. Mo. 2006).

3. *Id.* at 1079-83.

highly publicized decision handed down on August 8, 2006, Federal Magistrate Judge Mary Ann L. Medler ruled that the players' publicity rights did not extend to control of statistical information and that neither MLB nor the Players Association could interfere with the plaintiff's unlicensed use of that information. How the C.B.C. decision will fare on appeal has yet to be determined.

I. THE PLAYERS ASSOCIATION AND THE RIGHT TO PUBLICITY

The intervention in the C.B.C. litigation was hardly the first time that the Players Association had gone to court in an effort to enforce the publicity rights of its members. Such efforts actually date back to the late 1960s and originally began as part of an effort to obtain new revenue for the newly reorganized association. As such, it constituted an important chapter in both the history of the Players Association and in the development of the American law of the right of publicity. It is, however, a story that has never been adequately told.⁴

4. None of the standard histories of baseball labor relations in the 1960s, cited below, discuss this incident. Moreover, even though *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970), the judicial decision resulting from the early efforts to enforce such rights, has been frequently cited in law review articles, no legal scholar has paid any attention to the historical background of the case. On August 27, 2006, the LEXIS law review database contained ninety-one articles in which *Uhlaender* is cited, but only one of the ninety-one mentioned the full name of the plaintiff (Theodore or Ted Uhlaender), and it did not discuss the case in any detail.

Cases involving the sports industry have played a very important role in the development of the law of publicity generally. A list of such cases, which is certainly not exhaustive, would include: *Hanna Mfg. Co. v. Hillerich & Bradsby Co.*, 78 F.2d 763 (5th Cir. 1935); *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941); *Gautier v. Pro Football*, 107 N.E.2d 485 (N.Y. 1952); *Jansen v. Hilo Packing Co.*, 118 N.Y.S.2d 162 (Sup. Ct. 1952); *Haelan Labs. v. Topps Chewing Gum Inc.*, 202 F.2d 866 (2d Cir. 1953); *Branson v. Fawcett Publ'ns, Inc.*, 124 F. Supp. 429 (E.D. Ill. 1954); *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481 (3d Cir. 1956); *Sharman v. C. Schmidt & Sons, Inc.*, 216 F. Supp. 401 (E.D. Pa. 1963); *Palmer v. Schornhorn Enter., Inc.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967); *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969); *Uhlaender*, 316 F. Supp. 1277; *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129 (Wis. 1979); *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986); *Vinci v. Am. Can Co.*, 591 N.E.2d 793 (Ohio Ct. App. 1990); *Major League Baseball Players Ass'n v. Dad's Kid Corp.*, 806 F. Supp. 458 (S.D.N.Y. 1992); *Shamsky v. Garan, Inc.*, 632 N.Y.S.2d 930 (Sup. Ct. 1995); *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639 (Ct. App. 1995); *Town & Country Prop., Inc. v. Riggins*, 457 S.E.2d 356 (Va. 1995); *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996); *Hillerich & Bradsby Co. v. Christian Bros., Inc.*, 943 F. Supp. 1136 (D. Minn. 1996); *Newcombe v. Adolf Coors Co.*, 157 F.3d 686 (9th Cir. 1998); *Block v. Major League Baseball*, 76 Cal. Rptr. 2d 567 (Ct. App. 1998); *Allison v. Vintage Sports Plaques*, 136 F.3d 1443 (11th Cir. 1998); *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307 (Ct. App. 2001); *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003)(en banc) remanded to No. ED 85283, 2006 WL 1677856 (Mo. Ct. App. June 20, 2006); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 917 (6th Cir. 2003); *C.B.C. Distribution & Mktg., Inc.*, 443 F. Supp. 2d 1077.

For most of the history of MLB, players were exceptionally deferential to the rights of owners to control the baseball industry, and early efforts to organize players uniformly failed.⁵ The Players Association was formed in 1953, but its goals were quite modest and its members studiously refrained from referring to their organization as a union.⁶ In its early years, the Players Association, which operated with player representatives from all major league teams as well as a part-time director and a part-time legal adviser, seemed satisfied with the owners' willingness to raise the minimum salary for players and to establish a players' pension plan.⁷ Consequently, while there were a small number of players who favored more aggressive action, the Players Association as a whole remained quite docile and generally trusted the owners and the owner-appointed Commissioner of Baseball to look out for the interests of its members. One sign of the harmonious relationship between players and owners in the 1950s and early 1960s was the willingness of the owners to fund the Players Association through an annual transfer of \$150,000 from the revenue generated by the All-Star Game, a mid-season exhibition game between the best players of the American and National Leagues and for which the player-participants were not paid any additional money.⁸

In 1965, the Players Association decided that its activities were complicated enough to warrant the appointment of a full-time director.⁹ The decision was also motivated by growing disappointment with owner support for the pension system.¹⁰ Among those who applied for the job were Wisconsin Circuit Court Judge Robert C. Cannon, the current part-time legal adviser to the Players Association and an advocate of friendly owner-player relations, Hall of Fame pitcher and former Players Association activist Bob Feller, and United Steelworkers Union economist Marvin Miller.¹¹

In January 1966, the Players Association's Executive Committee selected Judge Cannon for the position.¹² To the surprise of many, Cannon declined

5. The literature on this topic is voluminous. See, e.g., LEE LOWENFISH, *THE IMPERFECT DIAMOND: A HISTORY OF BASEBALL'S LABOR WARS* (1991); ROBERT F. BURK, *NEVER JUST A GAME: PLAYERS, OWNERS, AND AMERICAN BASEBALL TO 1920* (1994); ROBERT F. BURK, *MUCH MORE THAN A GAME: PLAYERS, OWNERS, AND AMERICAN BASEBALL SINCE 1921* (2001).

6. See CHARLES P. KORR, *THE END OF BASEBALL AS WE KNEW IT: THE PLAYERS UNION, 1960-81*, at 15-34 (2002).

7. *Id.* at 15-18.

8. *Id.* at 46.

9. *Id.* at 28.

10. *Id.* at 47-48.

11. *Id.* at 28.

12. *Id.*

the position once he realized that he would have to resign his judicial post.¹³ Two months later, the Executive Committee recommended Marvin Miller for the position.¹⁴ Miller was supported by the more activist members of the Players Association, including pitchers Robin Roberts (who brought Miller's name to the attention of the players in 1965), Bob Friend, and future United States Senator Jim Bunning.¹⁵ In April 1966, the players formally approved the creation of the office of a permanent executive director and the appointment of Marvin Miller as the first holder of that office.¹⁶

Miller's 1966 appointment was not warmly received by the owners who had attempted to revive Cannon's candidacy by offering to compensate him for any pension benefits that he might lose by resigning from the Wisconsin judiciary.¹⁷ They also sought to use their influence, covertly through team managers, to convince players to vote against Miller for the Executive Director position in April balloting.¹⁸ Many baseball traditionalists and sportswriters were also opposed to the idea of a career labor man with a background in the Congress of Industrial Organizations taking charge of baseball's players.¹⁹

As a sign of their displeasure, the owners responded to Miller's appointment by canceling the \$150,000 annual transfer to the Players Association.²⁰ The precise nature of the source of the funds—whether they were a simple gift from the owners to the players or a form of compensation for the players' participation—had never been defined, but shortly after Miller's appointment, the owners took the position that the funds belonged to the owners.²¹ Consequently, they maintained, the contribution was legally prohibited by the Taft-Hartley Act,²² the post-World War II amendment to the federal labor laws adopted during the New Deal era of the 1930s.²³ Without any written evidence that would contradict the owners' assertion that the All-

13. *Id.*

14. *Id.* at 36.

15. *Id.* at 35.

16. *Id.* at 41; MARVIN MILLER, A WHOLE DIFFERENT BALL GAME: THE SPORT AND BUSINESS OF BASEBALL 86 (1991).

17. KORR, *supra* note 6, at 43.

18. *Id.* at 39-41.

19. MILLER, *supra* note 16, at 38.

20. KORR, *supra* note 6, at 47-48.

21. *Id.* at 49.

22. Labor Management Relations Act, 29 U.S.C. § 141 (2000).

23. Technically, the owners were correct in this assertion if one assumes that they were correct in their characterization of the \$150,000 as owner funds. The Taft-Hartley Act prohibited direct employer subsidies for union expenses. *Id.*

Star Game proceeds belonged to them, the Players Association had no option but to resign itself to the loss of its traditional source of funding.

Without the annual appropriation, the Players Association had no funds for its expenses other than a modest bank balance of less than \$6000 that had been there when Miller took office and the very modest revenue from members' dues that would be collected during the 1966 baseball season.²⁴ The primary solution proposed by Miller and accepted by the players was a substantial increase in annual dues and the adoption of a dues check-off system beginning with the 1967 baseball season.²⁵ Existing dues were only \$50 a year, but under the new system, beginning in 1967, each player would pay annual dues of \$530.²⁶

However, the new dues system could not be set up in time for the 1966 season, and in the fall and winter of 1966, the Players Association was essentially broke with the expanded dues revenue still several months away.²⁷ Consequently, Miller and his staff (which included former Pennsylvania Assistant Attorney General and United Steelworkers' lawyer Richard Moss) began to search for other sources of revenue.²⁸ It was in this context that the decision was made to seek out revenue by offering to license the images of MLB players.²⁹ As of 1966, the players had never made any collective effort to capitalize on their popularity even though in the 1960s MLB was still the most popular sporting enterprise in the United States. Individual players, of course, had endorsement deals, but there was no precedent for collective action. Desperate for revenue, Miller set out to find out if there was a market for the collective use of player images. To accomplish this, Players Association members were persuaded to accept a "commercial authorization contract," which allowed players to retain their individual publicity rights but which assigned to the Players Association the right to market players'

24. KORR, *supra* note 6, at 46.

25. *Id.* at 49.

26. According to *Uhlaender*, the Players Association in 1970 had over 850 members, which worked out to an average of slightly more than thirty-five players on each of the then twenty-four major league teams. *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1279 (D. Minn. 1970). However, at the time of Miller's appointment there were only twenty major league teams—four new teams were added for the 1969 season. Consequently, the number of members in 1966-67 was probably closer to 700. Even so, the new dues check-off system, once implemented, offered to more than make up for the lost revenue. The increase of dues by \$480 per player (from \$50 to \$530) meant that dues revenues would increase by approximately \$336,000, a sum more than double what the Players Association had previously received from the owners.

27. KORR, *supra* note 6, at 54.

28. *Id.* at 54-55.

29. *Id.*

identities as a group.³⁰

The first triumph for the Players Association came in the form of a licensing agreement with soft-drink producer Coca-Cola, which purchased from the Players Association the right to put pictures of MLB players under its bottle caps.³¹ A second accomplishment came in the form of a new collective agreement with Topps Chewing Gum, which held a virtual monopoly on the production of baseball cards in the United States. Topps (which packaged its cards with bubble gum) did not claim that it had a right to use the images of players without compensation, but its practice was to sign individual players to long-term contracts (often while they were still in the minor leagues) that paid a modest flat fee for the exclusive right to produce player images.³² When Miller and the Players Association sought to increase the income to players from Topps, the company initially refused to discuss a different arrangement, but once it became clear that players were following the direction of the Players Association to refuse to sign individual contracts or contract renewals, the company agreed in 1969 to significantly increase the amount of money paid to each player.³³ Other deals followed, and by 1969, licensing agreements were bringing in more than \$400,000 to the Players Association,³⁴ a significant sum for the times.

As part of the campaign to increase revenue, the Players Association also sought to identify individuals or companies who were using the names and images of MLB players for commercial purposes without paying anything at all to the players. The most obvious target was the sporting press, a multi-million dollar industry of newspapers, magazines and books, published to satisfy the public demand for sports-related information. Unfortunately for the Players Association, by the 1960s, it had already been established that the First Amendment to the United States Constitution provided a level of protection to the press and publishing industry that made them unlikely sources of license revenue.³⁵

30. *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 144 (3d Cir. 1981). This decision, which involves an antitrust action filed by one chewing gum company against another over the issue of the right to sell baseball cards, contains a discussion of the early licensing efforts of the Players Association.

31. KORR, *supra* note 6, at 54-55.

32. For Topps' role in the baseball card industry, see J. Gordon Hylton, *Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelan Laboratories v. Topps Chewing Gum*, 12 MARQ. SPORTS L. REV. 273 (2001), and *Fleer Corp.*, 658 F.2d at 142 (challenging the alleged Topps monopoly on antitrust grounds).

33. KORR, *supra* note 6, at 73-74; MILLER, *supra* note 16, at 142-52.

34. *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1279 (D. Minn. 1970).

35. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

A better target, one seemingly lacking the protection of the First Amendment, was the simulated baseball game industry. While the companies that manufactured them were hardly economic powerhouses like Coca-Cola or even Topps Chewing Gum, certain types of simulated baseball games clearly relied upon the use of the names and statistics of real life MLB players for their appeal.

II. A BRIEF HISTORY OF SIMULATED BASEBALL GAMES

Simulated baseball board games date back at least to the Civil War era, but the early versions of these games were quite generic. They allowed players to simulate a baseball match between two teams, but the games made no effort to replicate the play of specific players or to replicate the relative strengths of actual teams.³⁶ An entirely different type of baseball game was introduced in the 1920s when game designer Clifford Van Beek introduced a board game that he called "National Pastime."³⁷ Van Beek's game allowed players to simulate the play of actual MLB teams by using "cards" representing real MLB players.³⁸ The game player or players chose line-ups from a list of actual MLB players whose past statistics had been used to produce a "realistic" set of outcomes determined by some form of random number generator (usually a pair of dice, but sometimes a spinner).³⁹ Each roll of the dice or spin of the wheel represented an individual time at bat.⁴⁰ Not only did the game cards recognize that some MLB players were more talented than others, but they also allowed the players of "National Pastime" to make in-game decisions (like whether to sacrifice or attempt a stolen base) similar to those made by an actual MLB manager. Although his game was not an immediate success, Van Beek's idea eventually revolutionized the sports table game. While more traditional board games required players to have only a general understanding of the rules of baseball, Van Beek's game and its imitators rewarded those who were already knowledgeable about the details of MLB.

36. See JOEL ZOSS & JOHN BOWMAN, DIAMONDS IN THE ROUGH: THE UNTOLD HISTORY OF BASEBALL 25-27 (1996); MARK COOPER WITH DOUGLAS CONGDON-MARTIN, BASEBALL GAMES: HOME VERSIONS OF THE NATIONAL PASTIME, 1860S-1960S (2005).

37. There is some disagreement as to when Van Beek's game was actually introduced. See, e.g., Stephen Davis, *A Very Brief History of Table-Top Sports*, SPORTS GAME J., Sept./Oct. 2004, at 22, available at <http://www.sportplant.com/sbb/apfas/trial/pdf> (noting that the game was copyrighted in 1923).

38. Davis, *supra* note 37, at 22.

39. ZOSS & BOWMAN, *supra* note 36, at 26.

40. JIM ALBERT & JAY BENNETT, CURVE BALL: BASEBALL, STATISTICS, AND THE ROLE OF CHANCE IN THE GAME 2 (2001).

Baseball simulation games grew increasingly complex and statistically more realistic after the introduction of Ethan Allen's "All-Star Baseball" in 1941, and progressed even further in the post-World War II era.⁴¹ The two best known games of the postwar period were "APBA Baseball" (introduced in 1951) and "Strat-O-Matic Baseball" (1961).⁴² These more sophisticated games allowed players to trade baseball players from one team to another, pick all-star teams and, if they were sufficiently dedicated, players could simulate entire seasons, either by playing alone or with others.⁴³ Much of the games' appeal lay in the opportunity to calculate statistics generated in the simulated games. A devoted game player could easily devote hundreds of hours to the game.

While it was possible to have simulated baseball games with realistic but imaginary players, such games would clearly have lacked the appeal of games like "APBA Baseball" and "Strat-O-Matic," which were based on actual MLB players and performances.⁴⁴ In addition to more sophisticated baseball games, game designers developed similar games for other sports, including football, basketball, hockey, golf, and boxing. The most successful game companies regularly advertised in sporting magazines, and while most players were probably young, baseball-obsessed boys, most sports fans were aware of these games and generally familiar with how they were played. While such games hardly matched the truly popular board games of the era—Monopoly, Careers, Life, etc.—in terms of sales, they had carved out a comfortable niche in the marketplace. However, it is clear that before 1967, the right of game

41. For a detailed history of the development of statistically realistic tabletop baseball games, see ALBERT & BENNETT, *supra* note 40, at 1-25. Allen was a former professional player and the long time head baseball coach at Yale. For "All Star Baseball," see *Cadaco All-Star Baseball Making a Return*, TABLETOP-SPORTS.COM, <http://www.tabletop-sports.com/modules.php?op=modload&name=News&file=article&sid=52&mode=thread&order=0&thold=0> (last visited Nov. 9, 2006).

42. For "APBA Baseball," which was designed by J. Richard Seitz, see ALBERT & BENNETT, *supra* note 40, at 9-15, and APBA Games, About Us, http://www.apbagames.com/stadium/about_us/index.htm (last visited Nov. 4, 2006). For "Strato-Matic," see Will Kolodzie, *Hal Richman of Strat-O-Matic*, SPORTPLANET, Aug. 9, 2001, <http://www.sportplanet.com/features/interviews/som> and ALBERT & BENNETT, *supra* note 40, at 15-19.

43. ALBERT & BENNETT, *supra* note 40, at 9-15; ABA Games, *supra* note 42; Kolodzie, *supra* note 42.

44. The god-like power of the creator/player of simulated baseball games has appealed to certain literary figures, most famously Jack Kerouac and Robert Coover. Kerouac apparently played a simulated baseball game of his own invention throughout his life. The game cards are now part of the collection of the New York Public Library. See Albert Kim & Kostya Kennedy, *Toy Story: Jack Kerouac's Fantasy Baseball Game*, SPORTS ILLUSTRATED, June 10, 1992, at 28. A baseball simulation game also involving characters from the game creator/player's imagination is at the center of Coover's dark, brooding novel, THE UNIVERSAL BASEBALL ASSOCIATION, INC., J. HENRY WAUGH, PROP. (1968).

designers and manufacturers of simulation sports games to use the names and statistics of MLB players and other athletes without permission had gone unchallenged, presumably because of an assumption that such information was in the public domain and beyond the claim of individual property rights.

III. THE PLAYERS ASSOCIATION'S CAMPAIGN TO LICENSE BASEBALL SIMULATION GAMES

In spite of the apparent acceptance of the right of game manufacturers to use names and statistical information, in January 1967, the Players Association sent letters to the leading manufacturers of baseball simulation games.⁴⁵ Asserting that the game manufacturers were exploiting a "property right" of the players, the Players Association offered to license the use of MLB player names and images to any game manufacturer who was willing to pay the Players Association a license fee equaling 5% of its gross annual sales, with a minimum license fee of \$2500.⁴⁶ Unlike the later situation in which the Players Association agreed to grant Topps Chewing Gum a monopoly over the sale of baseball cards, either alone or with bubble gum, the letters to the game manufacturers made it clear that the Players Association would grant a non-exclusive license to any game company that sought one and that the terms of the license would be the same for each manufacturer.⁴⁷

Several months after the letters were sent to the manufacturers, a New Jersey court ruled that sports statistics and player names were protected under New Jersey law.⁴⁸ The New Jersey litigation had begun when four prominent professional golfers—Arnold Palmer, Jack Nicklaus, Gary Player, and Doug Sanders—filed suit against Schonhorn Enterprises, a New Jersey corporation that manufactured "Pro-Am Golf," a simulated golf game that used the names and biographies of leading professional golfers, including the four plaintiffs.⁴⁹

In most respects, "Pro-Am Golf" resembled the simulated baseball games that had been targeted by the Players Association. The game allowed players to simulate professional golf tournaments through the use of dice and charts

45. *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1279 (D. Minn. 1970). At almost exactly the same time, a group of professional golfers sent a similar letter to a New Jersey manufacturer of a simulated golf game that used the names and biographical information of real players. Although the record appears to be silent as to any official connection between the two efforts, it seems likely that the two groups were aware of each others efforts. See *Palmer v. Schonhorn Enter., Inc.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967).

46. *Uhlaender*, 316 F. Supp. at 1279.

47. *Id.* The inclusion of a so-called "most favored nations clause" removed any incentive for individual manufacturers to attempt to bargain for a better arrangement.

48. *Palmer*, 232 A.2d at 462.

49. *Id.* at 459.

based on the past performances of the golfers included in the game.⁵⁰ The box in which the game was sold contained the name of the game, a generic drawing of a golfer and caddy playing in front of spectators, and a description of the game, which included the phrase "profiles and playing charts of 23 famous golfers."⁵¹ The identities of the featured golfers were not revealed on the box, but were contained inside on twenty-three separate sheets of paper entitled "Profile and Playing Charts," each of which contained an accurate biographical profile of the golfer along with playing information used during the game.⁵² Consistent with the long-standing industry practices, the manufacturer had not sought the permission of the golfers to use their names or their statistics in the game, and when it was approached about purchasing a license from the golfers, it had declined to do so.⁵³

In July 1967, the Chancery Division of the Superior Court of New Jersey ruled in *Palmer v. Schonhorn Enterprises, Inc.*⁵⁴ that the manufacturer could not use the names of the plaintiffs without securing their permission.⁵⁵ Since no permission had been obtained, it enjoined the continued sale of the game.⁵⁶ The trial judge found that because the defendant was not part of the press or the publisher of a biography—commercial users who the judge acknowledged could legally make use of the same facts without paying royalties—it had no right to commercially exploit the names and biographical information of the plaintiffs.⁵⁷ In addition, it found that the golfers had not waived their right to bring such a lawsuit by deliberately inviting publicity.⁵⁸ Schonhorn Enterprises chose not to appeal the decision, and the litigation came to a close.⁵⁹

Whether they were influenced by the New Jersey court decision or simply

50. *Id.*

51. *Id.*

52. The reported opinion makes no mention of any pictures of the individual golfers, although the opinion in the Missouri case states that the game included photographs of the golfers. *C.B.C. Distribution & Mktg., Inc., v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1087 (E.D. Mo. 2006);

53. *Palmer*, 232 A.2d at 459.

54. *Id.* at 458.

55. *Id.* at 459.

56. *Id.* at 462.

57. *Id.*

58. *Id.*

59. Although it is clear that the lawyers for the Players Association in *Uhlaender* relied upon the decision in *Palmer*, it is not clear when the Players Association learned about the decision. It is clear that the effort to obtain license fees from the baseball game manufacturers was well underway when *Palmer* was decided. The initial lawsuit in *Palmer* was filed on November 1, 1966 in Atlantic County, New Jersey.

did not want to incur the costs of litigation, most of the leading game manufacturers agreed to purchase the offered licenses.⁶⁰ One company that refused to purchase a license but that continued to manufacture and sell annual versions of its games was the Minnesota-based Nemadji Game Company (better known as Negamco). Negamco was a small, family-run company operated by brothers Keith and Kent Henricksen.⁶¹ Negamco had been in operation since at least 1963, and some of the titles it sold dated back to 1954.⁶² (These may have been acquired from an earlier company.) In addition to selling simulated baseball games called "Negamco Major League Baseball" and "Big League Manager Baseball," the company sold similar games for football, hockey, basketball and golf.⁶³ Although the company sold its games nationally, its profits were extremely modest.⁶⁴

The Negamco baseball games were typical of the more sophisticated baseball simulation games. The 1967 version of "Big League Manager," for example, contained "cards" for eleven pitchers and fifteen position players for each of the then twenty major league teams, for a total of 520 cards.⁶⁵ Since most of a player's card was devoted to information pertaining to the result of a particular dice roll that was determined by recourse to the game's various charts, only the name of the player, his 1967 team, the positions he played, his uniform number, and, if he was a non-pitcher, his home run, runs batted in (RBI), and batting average totals from the previous season were included.⁶⁶ Pitchers' cards also listed won-lost record and earned run average. Advertising for the game described it as "scientifically computed" and emphasized the similarity between the decisions made while playing the game and those made by actual MLB managers.⁶⁷ Names of MLB players were attached to the game of "Big League Manager" to make a generic baseball

60. According to the opinion, "four or five" manufacturers agreed to pay the license fee after being contacted by the Players Association. *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1279 (D. Minn. 1970).

61. *Id.* at 1278.

62. Big League Game Company, EBAY.COM, <http://members.ebay.com/ws/eBayISAPI.dll?ViewUserPage&userid=bigleagueco> (last visited Nov. 9, 2006).

63. For information on the history of the Negamco Game Company, which apparently still exists as an Internet seller of vintage sports games, see *id.*

64. For evidence of the national marketing of Negamco Baseball, see the memoir of Rabbi Mayer Schiller entitled *Killer Goryl*. Growing up in New York City, Schiller was an avid Negamco Baseball player who purchased the game through the mail for several consecutive years. Mayer Schiller, *Killer Goryl*, ELYSIAN FIELDS Q.: THE BASEBALL REV. (2000), available at <http://www.efqreview.com/NewFiles/v17n4/numbersgame.html>.

65. *Uhlaender*, 316 F. Supp. at 1278.

66. *Id.*

67. *Id.*

game more appealing. The ability to replay and recreate the previous baseball season and to play a hypothetical new one was the essence of the game's appeal. Without the ability to "simulate" real baseball games with real players, the vast majority of Negamco game players would have been uninterested in the game. Negamco's other game, "Negamco's Major League Baseball," apparently included even more players, in some years reaching 700.⁶⁸

Although Negamco games were shipped to customers throughout the United States, the company's sales were quite modest. According to evidence introduced at trial, the two above-mentioned baseball games—almost surely the company's best selling products—accounted for only \$3727 in profits in 1969 and an estimated \$4300 in 1970.⁶⁹ Given the size of the minimum fee demanded by the Players Association, agreeing to a license in 1967 would have wiped out most of the company's profits over the next few years.

After unsuccessful efforts in 1968 and 1969 to persuade Negamco to purchase a license, the Players Association decided to file suit to seek an injunction against continued sale of its baseball games. Given that only \$2500 per year was at stake, one might have questioned the wisdom of the Players Association in actually suing the Henricksen brothers. However, Negamco games were well-known enough that the company's continued production of its games without a license would have likely been noticed by its competitors, and the Players Association may have legitimately feared that if it appeared to concede, even to one small company, on the issue of the right to control names and statistics, it might place its overall licensing program in jeopardy.

Consequently, in 1969, the Players Association filed suit against the Henricksen brothers in federal district court in Minnesota.⁷⁰ The reasons for filing in Minnesota were obvious, since the company's entire operations appeared to be located in that state. There were also a number of reasons to file suit in federal court rather than state court. The defendants were Minnesota residents, so the Players Association may have feared that a state court judge or jury might be biased in favor of their fellow Minnesota citizens. Moreover, as discussed below, Minnesota law was actually silent on the issue involved, and the Players Association may have anticipated that

a federal court would be more willing to acknowledge the existence of publicity rights than its state counterpart. While a trial court victory for the

68. *Id.* By way of reference, in 1967 a total of 719 players appeared in at least one MLB game. See SPORTS ENCYCLOPEDIA: BASEBALL 376-80 (David S. Neft & Richard M. Cohen eds., 16th ed. 1996) (calculated from the player rosters).

69. *Uhlaender*, 316 F. Supp. at 1283.

70. *Id.* at 1277-83.

Henricksens could have always been appealed, a verdict for the Henricksens would place the legitimacy of the licensing program in question and would require the still financially strapped Players Association to expend additional funds to prosecute the appeal.

Because the Players Association was an unincorporated legal entity, it could not sue the Henricksens in federal court in its own right.⁷¹ Moreover, because the legal question at issue was a matter of state, rather than federal, law, the Players Association could establish federal court jurisdiction only by establishing diversity of citizenship between the parties. Since the Henricksen brothers were Minnesota residents, the plaintiff had to be from a state other than Minnesota. This was accomplished by filing a class action suit under the recently revised Federal Rules of Civil Procedure.⁷² Although presumably any member of the Players Association who was not a resident of Minnesota (and who was one of the 500-700 players used in the defendants' games) could serve as plaintiff, it made sense to have the lawsuit brought in the name of one of the players for the Minnesota Twins, which were based in the Minneapolis-St. Paul area. Since the case was likely to come to trial during the 1970 baseball season, it would be much easier to arrange for a member of the Twins to be the named plaintiff because he was more likely to be in the Twin Cities once the trial began.

Chosen as lead plaintiff was Minnesota Twins outfielder Theodore (Ted) Uhlaender who sued "on behalf of himself and all other professional league baseball players similarly situated."⁷³ Why Uhlaender was chosen is not clear, except for the fact that while playing for the Twins he had remained a legal

71. See FED. R. CIV. P. 17(b).

72. The Federal Rules of Civil Procedure had been revised in 1966. Under the Revised Rule 23, diversity of citizenship in class action cases was determined by the domicile of the named plaintiffs and the defendants, and it did not require that all members of the class be domiciled outside of the defendant's home state. FED. R. CIV. P. 23. Class action suits by unincorporated associations were specifically provided for in FED. R. CIV. P. 23.2.

73. This phrase is from the style of the case. *Uhlaender*, 316 F. Supp. at 1277. Theodore Otto Uhlaender was born on October 21, 1940 in Chicago Heights, Illinois, but grew up in McAllen, Texas. The rangy (6'2", 190 lb.) outfielder played for (and graduated from) Baylor University before beginning his professional baseball career in 1961. He reached the major leagues with the Minnesota Twins in September of 1965, shortly before his twenty-fifth birthday and after winning the Pacific Coast League batting title. Uhlaender, who threw right-handed but batted left, was widely regarded as an excellent defensive outfielder, but only a so-so hitter. From 1966 to 1969, he was the Twins starting center fielder. His best season with the Twins came in 1969, the year Minnesota finished first in the newly created American League West Division. That year, he batted .273 with eight home runs, sixty-two runs batted in, and ninety-three runs scored. BASEBALL ENCYCLOPEDIA 675 (Peter Palmer & Gary Gillette eds., 2004); San Francisco Giants, Front Office - Ted Uhlaender, MLB.COM, http://sanfrancisco.giants.mlb.com/NASApp/mlb/sf/team/frontoffice_bios/uhlaender_ted.jsp (last visited Nov. 7, 2006); Ted Uhlaender, BASEBALLLIBRARY.COM, http://www.baseballlibrary.com/baseballlibrary/ballplayers/U/Uhlaender_Ted.stm (last visited Nov. 4, 2006).

resident of McAllen, Texas, which allowed the Players Association to establish diversity jurisdiction by suing in his name.⁷⁴ Joining Uhlaender as plaintiff was Players Association Executive Director Marvin Miller.

The trial itself was apparently straightforward. In its complaint, the Players Association did not claim ownership of the underlying statistical information that was used to prepare the player cards, but asserted that the defendants were guilty of "misappropriation and use for commercial profit of the names of professional major league baseball players without the payment of royalties."⁷⁵ Ironically, before the matter came to trial, Ted Uhlaender himself was traded by the Minnesota Twins to the Cleveland Indians as part of a multi-player trade not motivated by labor-management concerns.⁷⁶ Since he was no longer a Twin, Uhlaender did not appear at the trial. Instead, his former teammates, Twins pitchers Jim Kaat and Jim Perry (who would combine to win 498 games in their major league careers) offered fairly predictable testimony. Both testified that they believed that their names had financial value and that they had never consented to the use of their names in defendants' simulated baseball game.⁷⁷ Unfortunately, the defendants were

74. None of the histories of the Players Association or baseball labor relations in the 1960s and 1970s identify Uhlaender as a player advocate or as a leader of the Players Association. Uhlaender, then a Cleveland Indian who had led his team in hitting the previous season, was traded to Cincinnati for pitcher Milt Wilcox as part of an effort by the Indians to rid themselves of "dissidents." Russell Schneider, *Tribe Dumps Three Dissidents, Sees Wilcox as Key '72 Hurler*, SPORTING NEWS, Dec. 25, 1971, at 33. However, Uhlaender's problems had involved disagreements with his manager over a lack of playing time and not matters pertaining to owner-player relations. *Id.* In 2006, Uhlaender, currently an employee of the San Francisco Giants, failed to respond to the author's query as to the reasons for his involvement as the named plaintiff in the case.

Information on Uhlaender's domicile in 1969 can be found on the back of Topps Baseball Card #194 (Uhlaender) in the company's 1969 Baseball Card set. Uhlaender's home is listed as McAllen, Texas. By contrast, his teammate Jim Perry, a native North Carolinian, (Card #146) is listed as a resident of Edina, Minnesota, suggesting that Uhlaender retained his previous domicile while Perry had not.

75. *Uhlaender*, 316 F. Supp. at 1279.

76. Uhlaender was traded to the Indians in a multi-player trade on December 12, 1969. *Uhlaender*, *supra* note 73. He subsequently played for the Indians in 1970 and 1971, and in the latter year, he led the team in hitting with a career high .288 batting average. *Id.* As mentioned above, he was traded to the Cincinnati Reds after the 1971 season. Schneider, *supra* note 76, at 33. Although he appeared in the 1972 World Series with the Reds, his overall performance that year was quite disappointing. *Uhlaender*, *supra* note 73. He batted only .159, and after the World Series he disappeared from the ranks of Major League players. BASEBALL ENCYCLOPEDIA, *supra* note 73, at 675. For his career, he played in 898 games and batted .263 with 36 home runs and 285 runs batted in. *Id.* Since his retirement, he has been employed in organized baseball in a variety of capacities, including major league coach, minor league manager and coach, scout, and various front office positions. San Francisco Giants, *supra* note 73. He is currently the Special Assistant for Player Personnel of the San Francisco Giants. *Id.*

77. *Uhlaender*, 316 F. Supp. at 1279.

hampered by what appears to have been a failure by their lawyers to appreciate the true nature of the case. Although the lawyers for the Henricksens did argue that the publication of names and statistics by MLB placed these matters in the public domain, they also attempted to characterize the plaintiffs' suit as an invasion of privacy suit, which it was not.⁷⁸ They also apparently wasted time arguing that the relatively high minimum license fee (\$2500) and the Players Association's unwillingness to bargain constituted an antitrust violation because it had the effect of driving small game companies out of the market.⁷⁹ None of these defenses proved effective.

Given the developments of the last three decades of the twentieth century, the right of publicity was still in its formative era in 1970 when Minnesota District Judge Neville issued his opinion in *Uhlaender*. While many states, but by no means all, recognized the tort of misappropriation of a plaintiff's name or likeness for commercial benefit, the concept of publicity rights as property rights was one that few American courts had specifically embraced. Although the "right of publicity" as a form of property had been recognized by a decision of the United States Second Circuit Court of Appeals in 1953, there had been no rush on the part of American jurisdictions to embrace the new concept.⁸⁰ While some academic commentators, particularly Professor Melville B. Nimmer of the University of California, Los Angeles, enthusiastically endorsed the recognition of a new "property" right in one's personality, others were more cautious.⁸¹

Before 1970, most courts were still inclined to think in terms of "privacy rights" (which were generally non-commercial) rather than in terms of the more obviously commercialized "personality" or "publicity" rights. While the courts widely recognized that one could not use the image of another for commercial purposes, the offending action was still widely defined in terms of invasion of privacy or false endorsement and not (as would be the case with the right of publicity) in terms of appropriation of a property interest.⁸² It was

78. *Id.*

79. *Id.*

80. The right itself was first officially acknowledged in *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). For the history of this case and its role in the development of the right of publicity, see Hylton, *supra* note 32.

81. See Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954); Joseph R. Grodin, Note, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L.J. 1123 (1953) (published shortly before Nimmer's article, reaching a similar conclusion); Harold R. Gordon, *Right of Property in Name, Likeness, Personality, and History*, 55 NW. U. L. REV. 553 (1960) (essentially endorsing Nimmer's argument). But see William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960) (adopting a more cautious approach to the idea of a right of publicity); Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964).

82. See, e.g., *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481 (3d Cir. 1956); *Hogan v.*

not until the late 1960s that cases began to appear that acknowledged this distinction, but such decisions usually came from courts whose decisions had relatively little precedential value⁸³ and often involved decisions that either expressed skepticism about the existence of such a right⁸⁴ or dismissed the claim as unproven.⁸⁵ In other cases, the existence of a right of publicity appeared to be acknowledged, but only in the context of determining the boundaries of a licensing arrangement.⁸⁶ As of 1970, no American state supreme court had endorsed the right of publicity as a "property" right, and federal courts had done so in only New York, Pennsylvania, and Missouri.⁸⁷ In fact, the only reported judicial decision in the 1950s and 1960s that unambiguously recognized a commercial right of publicity was the decision of the New Jersey Superior Court in *Palmer*, discussed above, a decision which because of the nature of the court would normally have had little precedential value.⁸⁸ As right of publicity scholar and historian J. Thomas McCarthy has written, "In the courts, there were relatively few important developments in the 1960s."⁸⁹ Nor was there any widespread movement on the part of states to enact either privacy or right of publicity statutes in the 1950s and 1960s. Only three states—New York (1903), Virginia (1904), and Utah (1909)—had statutes protecting rights of privacy before 1953, and only two others, Oklahoma (1957 and 1967) and Florida (1967), did so between 1953 and 1970. However, none of these states explicitly defined the right against misappropriation as a property right.⁹⁰

Minnesota law was particularly undeveloped in this regard. The state had

A.S. Barnes & Co., 114 U.S.P.Q. (BNA) 314 (Pa. Ct. Com. Pl. 1957); *Fergerstrom v. Hawaiian Ocean View Estates, Inc.*, 441 P.2d 141 (Haw. 1968).

83. See, e.g., *Cabaniss v. Hipsley*, 151 S.E.2d 496 (Ga. Ct. App. 1966); *Palmer v. Schonhorn Enter., Inc.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967); *Canessa v. J.I. Kislak, Inc.*, 235 A.2d 62 (N.J. Sup. Ct. Law Div. 1967); *Rosemont Enter., Inc. v. Random House, Inc.*, 294 N.Y.S.2d 122 (Sup. Ct. 1968); *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501 (Sup. Ct. 1968).

84. See *Rosemont*, 294 N.Y.S.2d at 129; *Paulsen*, 299 N.Y.S.2d at 508-09.

85. See *Cabaniss*, 151 S.E.2d at 505.

86. *Sharman v. C. Schmidt & Sons, Inc.*, 216 F. Supp. 401 (E.D. Pa. 1963); *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969).

87. For a list of cases in which American courts have held that the right of publicity is a property right, see J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 10:7, at 10-9 to 10-10 (2003).

88. *Palmer*, 232 A.2d at 458.

89. MCCARTHY, *supra* note 87, § 1:30, at 1-51. McCarthy also characterizes the 1970s as the decade in which the right of publicity "came of age." *Id.* § 1:32, at 1-53.

90. For a list of state privacy and right of publicity statutes with dates of adoption, see MCCARTHY, *supra* note 87, § 6:8, at 6-18. The histories of the five mentioned statutes are discussed within *id.* §§ 6:51-52, at 6-101 to 6-104 (Fla.); §§ 6:73-74, at 6-138 to 6-142 (N.Y.); §§ 6:103-05, at 6-192 to 6-195 (Okla.); §§ 6:116-18, at 6-220 to 6-223 (Utah); §§ 6:119-21, at 6-223 to 6-228 (Va.).

no privacy statute, and no decision of the Minnesota Supreme Court had ever recognized the tort of misappropriation, let alone acknowledged the right of publicity as a protected property right.⁹¹

Consequently, when Judge Neville ruled in *Uhlaender* that Minnesota law recognized a *property* right that would prevent the defendants from using the names of MLB players in the design of their board games, the judge was not only overlooking the fact that there were no Minnesota statutes or judicial decisions to that effect, but he also issued his ruling in the absence of any real evidence that American law was moving in that direction.

The decision in *Uhlaender* advanced the case for a commercialized right of publicity in three important regards. First, it accepted that publicity rights extend to the control of names as well as visual images and that they apply when there is no possibility that a consumer might assume that the "celebrity" endorsed a particular product.⁹² Most successful lawsuits involving personality rights before 1970 had involved either situations in which the producer of a product used the picture of another individual in association with the product without the permission of the subject⁹³ or used the name of a celebrity in conjunction with a product in such a way that it implied an endorsement when no endorsement in fact existed.⁹⁴ However, in *Uhlaender*,

91. The status of the right of publicity in Minnesota at the time of *Uhlaender* can be seen from the discussion of the right in subsequent cases decided by Minnesota state courts. It was, in fact, not even clear that Minnesota recognized the tort of appropriation, or, for that matter, any form of the tort of invasion of privacy. See *Hendry v. Conner*, 226 N.W.2d 921, 923 (Minn. 1975); *House v. Sports Films & Talents, Inc.*, 351 N.W.2d 684, 685 (Minn. Ct. App. 1984); *Stubbs v. N. Mem'l Med. Ctr.*, 448 N.W.2d 78, 80 (Minn. Ct. App. 1989); *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21 (Minn. 1996); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998). All implicitly concur that Minnesota law was silent on the right of publicity at the time of the *Uhlaender* decision. In contrast, Minnesota federal courts have accepted that *Uhlaender* accurately stated the status of Minnesota law in 1970. See *Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 730 (8th Cir. 1995); *McFarland v. E & K Corp.*, 18 U.S.P.Q.2d 1246, 1247-48 (D. Minn. 1991); *Hillerich & Bradsby Co. v. Christian Bros., Inc.*, 943 F. Supp. 1136, 1141 (D. Minn. 1996).

92. *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1283 (D. Minn. 1970).

93. This was the type of case from which the modern law of privacy developed. The seminal cases were *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902) (finding no common law right of privacy, resulting in the adoption of a state statute) and *Pavesich v. New England Life Insurance Co.*, 50 S.E. 68 (Ga. 1905) (recognizing common law right of privacy). A mid-century case recognizing this right in the context of the unauthorized use of a MLB player's picture on a baseball card was *Jansen v. Hilo Packing Co.*, 118 N.Y.S.2d 162 (Sup. Ct. 1952) (decided under the New York statute adopted in the aftermath of *Roberson*).

94. This was the situation in *Sharman v. C. Schmidt & Sons, Inc.*, 216 F. Supp. 401 (E.D. Pa. 1963) and *Cepeda v. Swift & Co.*, 415 F. 2d 1205 (8th Cir. 1969). In these cases, two prominent professional athletes, National Basketball Association (NBA) star Bill Sharman and baseball MVP Orlando Cepeda, claimed that the use of their name or image with a product without their approval falsely implied to the public that they endorsed the products (in one case beer, and in the other, pre-packaged meat).

the game-makers did not use the image of any player in the game (only their names and certain easily obtainable biographical facts), and no user of the game would have any reason to believe that MLB players, whose careers were replicated by the game, were endorsing the product.

In regard to the right itself, Neville asserted that the plaintiffs had a distinct property interest in their names and statistics, as well as their images.⁹⁵ As Neville put it:

It is this court's view that a celebrity has a legitimate proprietary interest in his public personality. A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics and other personal characteristics, is the fruit of his labors and is a type of property.⁹⁶

While it was widely recognized that the use of a name alone could constitute the tort of appropriation, no previous state supreme court or federal court had ever held that *all* unauthorized uses of someone's name for any commercial purpose were invalid, but Neville's opinion appeared to say just that.⁹⁷

Neville also rejected the game-maker's claim that the information it was using—the names and statistics of the players—was so widely disseminated by the media that it had passed into the public domain and was, therefore, not subject to protection.⁹⁸ Again, in Neville's words:

Defendants' contention has no merit that by the publication in the news media and because of the ready availability to anyone of the names and statistical information concerning the players, such information is in the public domain and the players thus have waived their rights to relief in this case. Such argument may or may not have some weight against a right of privacy claim, but in an appropriation action such as in the case at bar the names and statistics are valuable only because of their past public disclosure, publicity and circulation.⁹⁹

And finally, Neville acknowledged the appropriateness of injunctive relief.

95. *Uhlaender*, 316 F. Supp. at 1282.

96. *Id.*

97. Judge Neville presumably would have acknowledged that the First Amendment to the United States Constitution would have protected the unauthorized use of player names by the commercial press. There was, however, no reason to address that issue in this case. *Id.* at 1279.

98. *Id.* at 1282-83.

99. *Id.*

In their complaint, the plaintiffs did not seek to recover damages for past economic losses but sought to enjoin the future sale of the games unless the defendants agreed to purchase a license from the plaintiffs.¹⁰⁰ To explain his willingness to issue the requested injunction, Neville wrote:

It seems clear to the court that a celebrity's property interest in his name and likeness is unique, and therefore there is no serious question as to the propriety of injunctive relief. Defendants have violated plaintiffs' rights by the unauthorized appropriation of their names and statistics for commercial use. The remedy at law, considering particularly the difficulty in determining and measuring damages, past or future, is inadequate.¹⁰¹

None of these issues had clearly been resolved by 1970, and the decision in *Uhlaender* was clearly a major victory for the advocates of an expanded right of publicity.

IV. THE CONSEQUENCES OF *UHLAENDER V. HENRICKSEN*

The decision in *Uhlaender* did not bring an end to the simulated baseball game industry. In fact, this genre of game appears to have flourished after 1970. The "Strat-O-Matic" and "APBA Baseball" games continued to do business and may well have profited from their new right to present their products as "approved" by the Players Association.¹⁰² The following year, the industry saw the introduction of the popular "Sports Illustrated Baseball" by David Neft, which was doubly endorsed by the nation's leading sports magazine as well as the Players Association.¹⁰³ In the 1980s, many of these games made the transition from game board and dice to personal computer, although their popularity was ultimately dwarfed by games like Electronic Arts' MLB series that allowed game players to control two-dimensional representations of real players.

The *Uhlaender* decision also did not spell the end of Negamco. The Henricksens chose not to appeal the decision, but they also remained steadfast in their refusal to purchase a license from the Players Association. To allow the Henricksens to sell off their existing inventory and honor existing contracts, Judge Neville delayed the effective date of his injunction to January

100. *Id.* at 1278.

101. *Id.* at 1283.

102. The existence of the license allowed the licensed games to advertise themselves as "approved by the Major League Baseball Players Association" which may have implied, incorrectly of course, that the game had been evaluated and endorsed by the Players Association.

103. ALBERT & BENNETT, *supra* note 40, at 20-24.

1, 1971, a date more than four months after the court's August 25, 1970 decision.¹⁰⁴ This delay not only allowed the Henricksens the opportunity to sell off any remaining 1970 games they had in stock, but it also allowed them to prepare a 1971 version of the game based on the 1970 regular season, which ended at the beginning of October.¹⁰⁵

Once the injunction took effect in 1971, the Henricksens continued to manufacture their baseball games. However, in lieu of the individual player names on the game cards, the game now included the name of the player's team, his statistics from the previous year, and a series of blank lines, one for each letter of the player's first and last names, with an extra space between the first and last names.¹⁰⁶ For example, a card for Ted Uhlaender in the 1972 version of the game featured his 1971 team (Cleveland), his core statistics (11 homeruns, 46 RBI's, and a .268 batting average) and the following dash configuration: _ _ _ _ _ .¹⁰⁷ The purchaser of the game would then obtain the statistics for the previous year and look for a Cleveland player with the above statistical record. Once the player was identified, the game owner could print the name "Ted Uhlaender" in the blank.¹⁰⁸ Although the game manufacturer was still using the player's statistics to identify him, there is no evidence that the Players Association took any additional action against the company which continued to produce new games until 1986 and which continues to sell old games over the Internet to this day.¹⁰⁹

Since *Uhlaender*, the Players Association has licensed the public rights of its members in a wide variety of contexts, and these licenses have been important sources of revenue for the Players Association and its members.¹¹⁰ In some cases, the Players Association has returned to court to protect these rights.¹¹¹

Most importantly, the decision in *Uhlaender* became a valuable precedent to be invoked by those who favored a more expansive right of publicity.

104. *Uhlaender*, 316 F. Supp. at 1283.

105. The pre-Christmas market was apparently the time in which the largest number of games were sold. *Id.*

106. Bob Collins, *Roll 'Em*, BLEACHER BUMS, Apr. 1, 2005, http://minnesota.publicradio.org/collections/special/columns/baseball/archive/2005/04/roll_em.shtml.

107. *Id.*

108. For the design of post January 1, 1971 editions of Negamco baseball games, see *id.*

109. See Big League Game Company, *supra* note 62.

110. See Major League Baseball Players Ass'n, *The Players Choice Licensing Program*, MLB.COM, <http://mlb.com/NASApp/mlb/pa/info/licensing.jsp> (last visited Nov. 20, 2006).

111. See, e.g., *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986); *Major League Baseball Players Ass'n v. Dad's Kid Corp.*, 806 F. Supp. 458 (S.D.N.Y. 1992); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996).

Although the specific issues addressed in the case—the ownership of statistics and biographical information attached to names—arose infrequently (at least before the *C.B.C.* litigation in 2005 and 2006, discussed above), the decision's unambiguous recognition of a property right in one's name and personality made it a useful case to cite in a wide variety of cases.¹¹² By the 1990s, if not earlier, it was widely acknowledged as one of the foundational cases of the modern right of publicity.¹¹³

More recently, the rationale of Judge Neville's decision has come under criticism from both commentators and judges. A number of academic commentators have argued that the decision over-protects necessary rights and was probably wrongly decided.¹¹⁴ Moreover, a number of copyright cases, decided since *Uhlaender* and involving issues pertaining to the "ownership" of facts, have come down on the side of facts being in the public domain.¹¹⁵ Although these cases may not apply directly to the right of publicity, they clearly have implications for cases like *Uhlaender*. Other decisions have raised the possibility that state right of publicity claims arising out of sporting events subject to copyright protection (like televised baseball games) may be preempted by federal law.¹¹⁶ Finally, a California appellate court and now the

112. The only case since *Uhlaender* that has directly addressed those issues is *Rosemont Enterprises, Inc. v. Urban Systems, Inc.*, 340 N.Y.S.2d 144 (Sup. Ct. 1973). This case involved a historical game based on events in the life of reclusive billionaire Howard Hughes and was found to violate Hughes' right of privacy under the New York statute. In an interesting qualification, the appellate court limited the impact of the lower court injunction against the sale of the game to New York state for fear that the use of Hughes' biographical facts for purposes of a game might be permitted in other jurisdictions.

113. For the significance of the *Uhlaender* decision, see MCCARTHY, *supra* note 87, §§ 1:32, 2:5, 4:47, 4:50, 4:84, 5:63, 6:3, 7:24, 10:7, 10:34, 11:19, 11:22, 11:23, 11:42. As of August 27, 2006, Shepard's citations listed forty-nine cases citing *Uhlaender*, as well as eighty-eight law review articles, four Restatements, and seven treatises. As of the same date, the Lexis law review database contained seventy-one articles citing the case.

114. See Arlen W. Langvardt, *The Troubling Implications of a Right of Publicity "Wheel" Spun Out of Control*, 45 KAN. L. REV. 329, 349 (1997); Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1 (1997); Robert T. Razzano, *Intellectual Property and Baseball Statistics: Can Major League Baseball Take Its Fantasy Ball and Go Home?*, 74 U. CIN. L. REV. 1157, 1181-82 (2006); Mathew G. Massari, *When Fantasy Meets Reality: The Clash Between On-line Fantasy Sports Providers and Intellectual Property Rights*, 19 HARV. J.L. & TECH. 443, 461-62 (2006). For a view generally critical of the right of publicity, see Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125 (1993); Diane Leenheer Zimmerman, *Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam You Made the Pants Too Long!*, 10 DEPAUL-LCA J. ART & ENT. L. & POL'Y 283 (2000); J. GORDAN HYLTON ET AL., *PROPERTY LAW AND THE PUBLIC INTEREST* 42-45 (2d ed. 2003).

115. See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340 (1991); *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997).

116. *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 674 (7th Cir. 1986).

Federal District Court for the Eastern District of Missouri have effectively held that the rationale of *Uhlaender* no longer applies in cases involving the ownership of factual information.¹¹⁷ In the latter case, the Players Association rested its unsuccessful argument for the control of statistical information squarely on the shoulders of the *Uhlaender* decision. Whatever its fate, for more than thirty years the case of *Uhlaender*, the product of the then struggling Players Association's scramble for additional sources of funding, has played a central role in the development of the American law of the right of publicity.

117. See *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307 (Ct. App. 2001); *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077 (E.D. Mo. 2006).